No. 78-1252

In the
Supreme Court of the United States
OCTOBER TERM, 1978

EDWARD Q. LUPIA,
Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC.,
a New York corporation,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit are as yet unreported, but are set forth in full in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES AND RULES INVOLVED

The pertinent provisions of the Robinson-Patman Act (15 U.S.C. §13(a) and 13(b)); the Sherman Antitrust Act (15 U.S.C. §1); the Clayton Act (15 U.S.C. §§14 and 15) are set forth in the Petition at pp. 7-11. The pertinent provisions of the United States Supreme Court Rules (Rule 19) are set forth in this Responsive Brief at pp. 6-7.

ISSUES PRESENTED

1. Does a distributor have standing to sue under Sections 2(a) or 2(c) of the Robinson-Patman Act for discriminatory discounts allegedly given by his supplier to certain of the distributor's retail customers and absorbed by the distributor.

2. May a distributor recover damages for price discrimination in favor of other distributors where the distributor did not compete with the favored distributors in the same market area.

STATEMENT OF THE CASE

This case arises out of an antitrust complaint brought against Respondent, Stella D'Oro Biscuit Co., Inc., a manufacturer of cookies, biscuits, breadsticks and other bakery products. The complaint was filed by Petitioner, Edward Q. Lupia, an exclusive distributor of Stella D'Oro products in the Chicago metropolitan area from September, 1961 until December 31, 1971.

On March 27, 1975, Respondent moved in the District Court for summary judgment on all four counts of the complaint (App. 181)* on the following grounds: (i) Petitioner did not have standing to sue for the alleged anti-

*"App" refers to the Appendix filed by the Petitioner in the Court of Appeals for the Seventh Circuit.

trust violations against retailers and the discriminatory discount was not unlawful brokerage under Section 2(c) of the Robinson-Patman Act (15 U.S.C. §13(c)) (Count I); (ii) Petitioner could not show that substantial competition existed between him and favored distributors as required to recover under Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)) (Count III); and (iii) Petitioner could not show a reasonable probability that the exclusive dealing and non-competition provisions of his contract would substantially lessen competition in the relevant line of commerce as required by Section 3 of the Clayton Act (15 U.S.C. §14) and Section 1 of the Sherman Act (15 U.S.C. §1) (Counts II and IV). Respondent's motion was based on and supported by the complaint, as amended, Petitioner's answers to various sets of written interrogatories, deposition testimony and certain exhibits.

Thereafter, Petitioner filed a cross-motion for summary judgment on Count I and a partial summary judgment on Counts II, III and IV (App. 184). A lengthy Affidavit and subsequent Supplemental Affidavit were submitted by Petitioner both in support of his motion and in opposition to Respondent's motion (App. 189-266, 277). The District Court struck and dismissed Petitioner's affidavits as being improper (App. 292) and Petitioner filed a "Second Supplemental Affidavit" which was also objected to by Respondent (App. 302, SDO's App. 210)*.

On May 31, 1977, the District Court entered summary judgment in favor of Respondent on all counts (Appendix pp. 18a-34a).** In its memorandum opinion, the District

*"SDO's App." refers to Respondent's Supplemental Appendix filed in the Court of Appeals for the Seventh Circuit.

**"Appendix" refers to the Appendix filed in this Court by the Petitioner.

Judge stated that the "Second Supplemental Affidavit" had the same defects as the affidavits previously stricken (Appendix pp. 28a, note 11). Petitioner appealed to the Seventh Circuit Court of Appeals (App. 437) and on November 15, 1978, the Court of Appeals for the Seventh Circuit affirmed the district court's decision granting summary judgment in favor of Respondent on all counts.

STATEMENT OF FACTS

Petitioner's statement of facts is substantially one-sided. A more accurate treatment of the facts is found in the opinion of the district court and the Court of Appeals (Appendix pp. 1a-2a; 19a-20a).

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE NO GROUND EXISTS FOR THE GRANTING OF THE WRIT.

The exercise of certiorari jurisdiction has been a frequent subject of scholarly debate and pronouncements of this Court and its justices. In *Magnum Co.* v. *Coty,* 262 U.S. 159, 163 (1923), Chief Justice Taft, in much quoted language, stated:

> "The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The Petition in the instant case falls within the category of cases referred to by Chief Justice Taft as outside the scope of Supreme Court review. The Petition does not even approach the standards for certiorari jurisdiction enumerated by this Court and by Supreme Court Rule 19. Supreme Court Rule 19 in its pertinent part provides:

> "Rule 19. Consideration governing review on certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> • • •
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of

> appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . ."

Petitioner's reasons for seeking *certiorari* are conclusionary and no more than a rehash of the same arguments on the merits that were presented below. Petitioner has made no attempt to show the importance of the issues or demonstrate any of the considerations set forth in Rule 19. Rather, Petitioner merely states, without citation, that the lower court decisions "would emasculate and make a mockery of the remedial purpose and public policy considerations of Section 4 of the Clayton Act," alleging that the Court of Appeals "over-reacted" in this case to this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977) and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977). [Petition p. 35]

The decision of the Court of Appeals in this case is not novel, and no amount of verbosity can convert it into one warranting review by this Court on certiorari. The lower court decisions were predicated on a relatively unique set of facts whose outcome is limited to the parties. Further, taken in a *Robinson-Patman Act* context, this case is similar to this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977).

A. This Court And The Circuit Courts Of Appeal Have Uniformly Held That An Injury Should Reflect The Anticompetitive Effect Of The Violation.

Count I of Petitioner's complaint alleged that Respondent granted a five percent discount to certain retail chain store accounts, but not to other retail store accounts. Petitioner claimed that the discounts were discriminatory

and in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). Petitioner alleged that his damages equaled the discounts granted over a four-year period because he was charged with and had to absorb the full dollar amount of the discounts. The lower courts found that if there was an anti-competitive effect, the injury was suffered by those retail customers who did not receive the discount, and not the Petitioner.

The Court of Appeals concluded, relying upon, *inter alia, Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, (1977) that Petitioner had not suffered an antitrust injury. The Petitioner could not recover for discounts he absorbed, merely because they may have been discriminatory or anticompetitive to someone else. As the Court of Appeals stated:

> "As regards 'antitrust injury,' plaintiff [Petitioner] does not pass the *Brunswick* test. The defendant's [Respondent's] anticompetitive action, the 5 percent rebate to chain stores, would have been equally anticompetitive if plaintiff [Petitioner] had not been required to absorb it. That he was so required is, therefore, not an 'anti-trust injury' but one reflecting harsh treatment of a distributor by a manufacturer. If defendant [Respondent] had absorbed the rebate, there would have been no injury, yet the anticompetitive nature of its policy would not have been affected one iota. So it is not an 'antitrust injury'. Judge Flaum found that plaintiff [Petitioner] was unable to raise an issue of fact that it could have sold to the chains without the rebate." (Appendix p. 8a)

Further, Petitioner was unable to show that, but for the discount, he would have been unable to sell any merchandise at all. Further, in answers to interrogatories propounded at deposition, Petitioner stated that (i) he could not have received a higher price for the discounted products, (ii)

he knew of no instance where he could have received a higher price, and (iii) he neither tried to obtain nor did any chain store account express a desire to pay a higher price for the products. Finally, Petitioner admitted that he knew of no customer who would have purchased the discounted goods at a higher price since the demand for Respondent's products was already filled. SDO's Appendix, pp. 137-147).

Relying upon the decisions of the Circuit Courts of Appeals, in *GAF* v. *Circle Floor Co., Inc.,* 463 F.2d 752, 757-759 (2nd Cir. 1972); *In Re Multidistrict Vehicle Air Pollution MDL No. 31,* 481 F.2d 122 (9th Cir. 1973); *Kirby* v. *P. R. Mallory & Co.,* 489 F.2d 904, 911 (7th Cir. 1973); *Conference of Studio Unions* v. *Loew's Inc.,* 193 F.2d 51, 55 (9th Cir. 1951); *Reibert* v. *Atlantic Richfield Co.,* 471 F.2d 727, 731-732 (10th Cir. 1973); *Ragar* v. *T. J. Raney & Sons,* 388 F.Supp. 1184 (E.D.Ark. 1975) Aff'd. *per curiam* 521 F.2d 795 (8th Cir. 1975) the Court of Appeals also concluded that Petitioner could not show any injury because he could not show that he could have received a higher price for the discounted goods, as shown by the deposition and interrogatory answers on file.

Petitioner alleged, as an alternative ground for recovery in Count I, that Respondent's five percent discount was illegal brokerage prohibited by Section 2(c) of the Robinson-Patman Act (15 U.S.C. §13(c)). That provision, however, prohibits only the granting of brokerage or discounts in lieu of brokerage where brokerage services were not actually rendered. The Court of Appeals found from the record, that the discounts were straightforward and not disguised as brokerage, relying upon *Federal Trade Commission* v. *Henry Broch & Co.,* 363 U.S. 166 (1960).

Petitioner claimed that Section 2(c) covered all indirect price concessions. However, the Court of Appeals, relying upon *Federal Trade Commission* v. *Simplicity Pattern Co.,* 360 U.S. 55, 1959) disagreed. The Court of Appeals held that Section 2(c) outlawed only unearned brokerage fees *per se* in order to force sellers to confine their discriminatory practices to those dealings whose effect could be more readily measured by the competitive yardstick set forth in Section 2(a). Since the Petitioner had not shown how the discounts were brokerage or discounts in lieu of brokerage, the Court of Appeals properly denied the Section 2(c) claim, holding that the discounts were not disguised and must be tested under Section 2(a).

The Petitioner's assertion that the lower courts improperly disregarded his claims pursuant to Section 1 of the Sherman Act (15 U.S.C. §1) for vertical price fixing is without merit. Nowhere in Count I is an allegation made for recovery pursuant to Section 1 of the Sherman Act. It was only in Count IV of Petitioner's complaint that a vertical price fixing charge was alleged, but there was never a prayer for damages resulting from such alleged acts. In fact, the vertical price fixing charges were dismissed in the proceedings, as cited by the Court of Appeals (Appendix pp. 10a, 14a). Finally, even if vertical price fixing were properly before the lower courts, Petitioner has suffered no anti-competitive injury for the reasons set forth in the lower courts' opinions.

B. The Circuit Courts Of Appeal Have Uniformly Held That A Customer Alleging Price Discrimination Among Customers Must Show That He Competes In The Sale Of The Product With Those Customers Receiving A Favored Price.

Count III of Petitioner's complaint alleges that Respondent discriminated between its distributors in connection with the sale price of its merchandise. Specifically, Petitioner alleged that he had to pay a higher price (three percent more) than certain of Respondent's favored distributors, in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). Petitioner alleged that his damages equaled the difference between what he paid for Respondent's goods and what the favored distributors paid for the same goods between 1961 and 1971. The distributors, who allegedly received a lower price included distributors in Michigan, Pennsylvania, Ohio, Florida, Minnesota, Missouri, and others as far away as Texas, Oklahoma and Kansas.

As a distributor, Petitioner was no more than a customer of Respondent. As such, the Court of Appeals, relying upon *Mayer Paving and Asphalt Co.* v. *General Dynamics Corp.*, 486 F.2d 763, 770 (7th Cir. 1973) *certiorari denied* 414 U.S. 1146 (1974); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966); *Chicago Sugar* v. *American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949); *Collins Oil Co.* v. *Teneco, Inc.*, 556 F.2d 1274 (5th Cir. 1977); *American Oil Co.* v. *McMullin* 508 F.2d 1345, 1353 (10th Cir. 1975), held that substantial injury to competition must exist, and stated that this required:

> "[Petitioner] must allege and demonstrate that he was a disfavored purchaser who competed with favored purchasers and was injured as a result." (Appendix p. 12a)

On the basis of the facts presented by Petitioners, the Court of Appeals found that there was no evidence of competition between Petitioner and the favored distributors. In the one border area that Petitioner claimed to compete with a favored distributor, Petitioner could not detail the extent of his activity, the customers he would have been able to deal with absent the discriminatory price, or estimate the sales he actually lost. The Court of Appeals thus properly concluded, relying upon *Universal-Rundle Co.* v. *Federal Trade Commission,* 382 F.2d 285 (7th Cir. 1967), that such nebulous competition was "de minimus" or "sporadic" and that as such "it is unlikely that a 'lessening of competition' or 'tendency to create a monopoly' will occur." [citations omitted] (Appendix p. 12a)

In the District Court, the Court of Appeals, and now in his Petition, the Petitioner states "Section 2(a) still provides a remedy in an appropriate secondary-line case, even in the absence of competing purchasers". (Petition, page 56) Such a contention is totally unsupported in the case law. In fact, as previously cited, it has been uniformly held that competition between purchasers is essential in a secondary line case under Section 2(a) of the Robinson-Patman Act.

The Court of Appeals best described the fallacy of Petitioner's argument in its opinion, when it stated:

> "Cases cited by plaintiff [Petitioner] in support of the proposition that plaintiff [Petitioner] need not show that his own competitors are receiving a favored price are cases where the plaintiff was a competitor of the very defendant who is charging the

> discriminatory prices. In these so-called "primary line" cases, the parties to whom defendant is granting favored prices need not be direct competitors of the plaintiff, since it is assumed that in that situation, defendant has the ability to seduce customers of plaintiff with an offer of lower prices while maintaining profits by a discriminatory charge of higher prices to "steady" or obligated customers. But this advantage of defendant is of no consequence to plaintiff if plaintiff does not compete with the defendant." (Appendix pp. 11a)

Petitioner argues that Respondent is estopped from asserting the lack of competition with favored distributors because of Respondent's alleged territorial restraints. Allegations of territorial restraint are not contained in Count III of the complaint. Further, even assuming the existence of territorial restraints, Petitioner is not excused from showing a competitive relationship with favored distributors. *Bales* v. *Kansas City Stock Co.*, 336 F.2d 439, 444 (8th Cir. 1964); *Auto Imports, Ltd.* v. *Peugeot, Inc.*, 1964 CCH Trade Cases, ¶71,098 (S.D.N.Y. 1964).

C. This Court And The Circuit Courts Of Appeal Have Uniformly Held That An Exclusive Dealing Agreement Is Barred By Section 3 Of The Clayton Act Only If Its Effect May Substantially Lessen Competition Or Tend To Create A Monopoly In Any Line Of Commerce.

Counts II and IV of the complaint allege that Petitioner was barred by his agreement with Respondent from selling products of other manufacturers unless purchased through Respondent in *per se* violation of Section 3 of the Clayton Act (15 U.S.C. §14) and Section 1 of the Sherman Act (15 U.S.C. §1). In addition, Petitioner claims

that the requirement to buy products through Respondent constitutes a tying arrangement in *per se* violation of Section 1 of the Sherman Act (15 U.S.C. §1).

The Court of Appeals, applying *White Motor Co.* v. *United States*, 372 U.S. 253 (1963) held that an exclusive agreement was not a *per se* violation of the antitrust law. Such an agreement would be barred by Section 3 of the Clayton Act only if its affect may be "to substantially lessen competition or tend to create a monopoly in any line of commerce". Since Petitioner was totally unaware of the share of the relevant market foreclosed by the exclusive dealing agreement and did not even allege facts to demonstrate that Respondent's marketing practices foreclosed competitors of Respondent from a substantial market, the Court of Appeals properly denied Petitioner's claim. *Pitchford* v. *Pepi, Inc.*, 531 F.2d 92 (3rd Cir. 1975) *certiorari denied* 426 U.S. 935 (1976); *Becker* v. *Safelite Glass Corp.*, 244 F.Supp. 625, 639 (D.Kan. 1965).

Regarding Petitioner's claim that there existed an illegal tying arrangement, the Court of Appeals properly pointed out that tying arrangements were made illegal to prevent a party dominant in one market (the tying market) from controlling another market (the tied market) by refusing to sell one product without the other. The Court of Appeals denied Petitioner's claim because there was only one market involved (bakery products) not two separate markets, and (ii) Petitioner was not required to purchase one product as a condition of buying the other. Such conclusion is in conformity with *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 605 (1953); *Seigel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir.) *certiorari denied* 405 U.S. 955 (1971); *Capital*

Temporaries, Inc. of Hartford v. *Olsten Corp.*, 506 F.2d 658 (2nd Cir. 1974); *Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29 (7th Cir. 1976).

CONCLUSION

Petitioner fails to show any proper ground for the granting of certiorari in the instant case. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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